

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

10 ELDER ZACARIAS-LOPEZ,)
11 Petitioner,) 2:05-cv-1156-JCM-PAL
12 vs.)
13 D.W. NEVEN, *et al.*,)
14 Respondents.)
15 /

16 This action proceeds on a petition for a writ of habeas corpus pursuant to 28 U.S.C.
17 §2254, by Elder Zacarias-Lopez, represented by counsel. Before the court is respondents' motion to
18 dismiss and errata thereto, petitioner's opposition, and respondents' reply.

19 | I. Procedural Background

Petitioner was convicted of murder with the use of a deadly weapon on May 28, 2002.
Exhibit 12.¹ The jury deliberated and entered its sentencing verdict on May 29, 2002. Exhibit 14.
Petitioner moved for a new penalty hearing when it was discovered that the trial court had received
and responded to questions from the jury during its penalty deliberations without notifying the
parties. Exhibit 17. The motion was denied and petitioner was sentenced to two consecutive terms

²⁶ ¹ The exhibits referenced in this order were submitted by respondents in support of the motion to dismiss and are found in the court's record at docket #30.

1 of life with the possibility of parole after twenty years. Exhibit 18. Petitioner appealed. Exhibit 19.

2 On appeal, petitioner argued four issues:

- 3 I. The trial court committed prejudicial error by improperly excluding
admissible, non-hearsay evidence of identification.
- 4 II. The trial court committed prejudicial error by admitting totally
irrelevant evidence of the “cooperative” attitude of those individuals
detained at the shooting scene.
- 5 III. The trial court committed prejudicial error by improperly excluding
evidence of defendant’s limited mental capacity.
- 6 IV. The trial court committed prejudicial error by denying defendant’s
motion for a new penalty hearing.

7 Exhibit 20.

8 After full briefing, the Nevada Supreme Court affirmed the conviction on May 11,
9 2004. Exhibit 22. Remittitur issued on June 8, 2004. Exhibit 23.

10 A post-conviction petition was filed by petitioner on November 22, 2004. Exhibit 24.

11 The petition raised several grounds, including:

- 12 I. The State of Nevada violated the Vienna Convention in not informing
Elder Zacarias-Lopez of Guatemala, of his rights under it [sic] 5th, 6th,
13 14th Amendments to the U.S. Const; Article 6, Supremacy [sic]
Clause violation: Nev. Constitution violations: Art. 1&8, Art 1&2;
Art. 1& 2.5.
- 14 II. Mr. Lopez asserts that his substantive, fundamental and procedure,
due process of law rights were violated, where counsel acted as an
agent for the District Attorney’s office, by abridging petitioner’s
constitutional right to appear before preliminary examination within
(15) days, thereby violating petitioner’s 5th, 6th, and 14th Amendments
of the United States Constitution.
- 15 III. Improper identification process denied Mr. Lopez effective assistance
of counsel prior and during trial and on direct appeal in violation of
the 5th, 6th, and 14th Amendments to the United States Constitution
wich [sic] guarantee petitioner due process of the law.
- 16 IV. District Court, prosecution knowingly, intentionally used false
testimony, elicited and made intentional and prejudicial
misstatements of law, during jury selection, opening statements,
during the trial and closing summation in violation of due process of
the law guaranteed to Elder Zacarias-Lopez under 5th, 6th, 9th and 14th
Amendments to U.S. Const.
- 17 V. District Court improperly precluded Elder Zacarias-Lopez from

1 presenting petitioner's complete defense to the jury in violation of
2 petitioner's 5th, 6th, and 14th Amendment rights to the United States
3 Constitution which [sic] guarantee Mr. Elder Zacarias-Lopez due
4 process of law, equal protection of the law and effective assistance of
counsel from arraignment through direct appeal and a [sic] impartial
jury trial of his peers.

- 5 VI. The reasonable doubt instruction at trial was unconstitutional and in
6 violation of Mr. Elder Zacarias-Lopez guaranteed rights under the 5th,
7 6th, and 14th Amendments to the United States Constitution, which
8 guarantee Mr. Lopez due process of the law.
- 7 VII. Mr. Lopez was denied effective assistance of counsel prior to and
8 during trial, and on direct appeal, in violation of the 6th and 14th
Amendments to the United States Constitution.

9 *Id.*

10 The district court denied the petition on February 23, 2005. Exhibit 32. On appeal,
11 the Nevada Supreme Court affirmed this decision. Exhibit 33. Remittitur was entered on July 12,
12 2005. Exhibit 34.

13 Petitioner arrived at the federal court on September 15, 2005, and after the issue of
14 the filing fee was resolved, his petition was filed on January 17, 2006. (ECF No. 5.) Following an
15 initial motion to dismiss, petitioner obtained counsel, who moved to amend the petition and then
16 sought a stay and abeyance to return to state court to exhaust newly added and unexhausted claims.
17 (ECF Nos. 11, 16, 17.) The stay was granted, the amended petition was filed on May 3, 2008, and
18 petitioner returned to the state court.

19 On January 19, 2011, petitioner moved to reopen the case and respondents filed their
20 motion to dismiss. (ECF Nos. 27 and 29.) Respondents seek dismissal of grounds 3 through 9 as
21 untimely and grounds 2 through 9 of the petition as procedurally barred. Petitioner presents
22 arguments as to cause and prejudice and actual innocence in an attempt to overcome dismissal.

23 **III. Discussion**

24 A. Statute of Limitations

25 On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) came
26 into effect. Pub.L. No. 104-132, 110 Stat. 1214-1226 (1996). The AEDPA made various

1 amendments to the statutes controlling federal habeas corpus practice. One of the amendments
 2 imposed a one-year statute of limitations on the filing of federal habeas corpus petitions. With
 3 respect to the statute of limitations, the habeas corpus statute provides:

4 (d)(1) A 1-year period of limitation shall apply to an application for a writ
 5 of habeas corpus by a person in custody pursuant to the judgment of a
 6 State court. The limitation period shall run from the latest of—

- 7 (A) the date on which the judgment became final by the conclusion
 8 of direct review or the expiration of the time for seeking such
 9 review;
- 10 (B) the date on which the impediment to filing an application
 11 created by State action in violation of the Constitution or laws of
 12 the United States is removed, if the applicant was prevented from
 13 filing by such State action;
- 14 (C) the date on which the constitutional right asserted was initially
 15 recognized by the Supreme Court, if the right has been newly
 16 recognized by the Supreme Court and made retroactively
 17 applicable to cases on collateral review; or
- 18 (D) the date on which the factual predicate of the claim or claims
 19 presented could have been discovered through the exercise of due
 20 diligence.

21 28 U.S.C. § 2244(d)(1)(A-D).

22 For convictions that became final prior to the enactment of the AEDPA, a petitioner
 23 had until April 24, 1997, to file a federal habeas corpus petition. *See Patterson v. Stewart*, 251 F.3d
 24 1243, 1246 (9th Cir. 2001).

25 The AEDPA limitations period is tolled while a “properly filed application” for post
 26 conviction or other collateral relief is pending before a state court. 28 U.S.C. § 2244(d)(2). A
 27 “properly filed application” is one in which the “delivery and acceptance are in compliance with the
 28 applicable laws and rules governing filings.” *Dictado v. Ducharme*, 244 F.3d 724, 726-27 (9th Cir.
 29 2001), quoting *Artuz v. Bennett*, 531 U.S. 4, 121 S.Ct. 361, 364 (2000).

30 The AEDPA limitations period is also subject to equitable tolling. *See Holland v.*
 31 *Florida*, 560 U.S. ___, 130 S.Ct. 2549, 2560 (2010); *Calderon v. United States District Court*

1 (*Beeler*), 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled in part on other grounds*, *Calderon v.*
 2 *United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998). Equitable tolling is available
 3 only “if extraordinary circumstances beyond a prisoner’s control make it impossible to file a petition
 4 on time.” *Beeler*, 128 F.3d at 1288; *see also, Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct.
 5 1807 (2005). In certain circumstances, the misconduct of counsel can, if sufficiently egregious,
 6 justify such tolling. *Holland*, 130 S.Ct. at 2564-65.

7 In this instance, petitioner had expired 76 days between June 8, 2004, the time his
 8 conviction was final, including the 90 days allowed to seek certiorari from the United States
 9 Supreme Court, and the time he filed his first post-conviction habeas petition on November 22,
 10 2004. He also expired 63 days between July 12, 2005, the date remittitur issued on his post-
 11 conviction appeal and September 14, 2005, the date he signed his federal habeas petition. Thus, he
 12 had a balance of 236 days left in his year. However, because the filing of a federal habeas petition
 13 does not toll the statute of limitations, *see Duncan v. Walker*, 533 U.S. 167, 121 S.Ct. 2120 (2001),
 14 the remaining 236 days and the one-year period expired well before the amended petition was filed
 15 on May 3, 2008.

16 B. Relation Back

17 Respondents rely on the holding of *Mayle v. Felix*, 545 U.S. 644, 125 S.Ct. 2562
 18 (2005) to support their argument that ground 3-9 of the amended petition are untimely. In *Mayle*, the
 19 petitioner originally raised only a confrontation clause claim in his habeas petition, based on the
 20 admission of video-taped prosecution witness testimony. 545 U.S. at 648-49, 125 S.Ct. at 2566.
 21 After the one-year AEDPA statute of limitations had passed, petitioner then sought to amend his
 22 habeas petition to allege a fifth amendment claim based on coercive police tactics used to obtain
 23 damaging statements from him. *Id.* The factual basis for each claim was distinct. Petitioner then
 24 argued that his amended claim related back to the date of his original habeas petition because the
 25 claim arose out of the same trial, conviction or sentence. *Id.* at 659-661, 125 S.Ct. at 2572-2573. In
 26 rejecting petitioner’s argument the Supreme Court held that if “claims asserted after the one-year

1 period could be revived simply because they relate to the same trial, conviction, or sentence as a
 2 timely filed claim, AEDPA's limitation period would have slim significance." *Id.* at 662. Thus, the
 3 Supreme Court concluded that new claims raised after the expiration of the one-year limitation
 4 period imposed by 28 U.S.C. § 2244(d) must involve a common "core of operative facts" uniting
 5 them to the original claims. *Mayles*, 545 U.S., at 660, 125 S.Ct., at 2573 (citing *Clipper Express v.*
 6 *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d, 1246, 1259, n. 29 (9th Cir. 1982); *see also*, 6A
 7 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1497, p. 85 (2d ed.1990).

8 In his original petition filed on January 17, 2006, petitioner claimed a due process
 9 violation where the court failed to notify the parties during deliberation of a jury question and the
 10 court's answer to that question and where the jury was not informed of the extra penalty imposed for
 11 the use of a deadly weapon.

12 In the amended petition filed on May 3, 2008, petitioner raises nine claims. Ground
 13 one relates back to the original petition in that it argues a due process violation for failing to inform
 14 counsel that the jury had sent questions during deliberations. Ground two also relates back to the
 15 original petition in that it alleges a violation of the *Apprendi* decision for failing to instruct the jury
 16 that it must find the element of use of a deadly weapon separate and in addition to all the elements of
 17 the underlying crime, beyond a reasonable doubt. Thus, these two grounds for relief are timely filed.

18 However, the remaining grounds for relief in no way share a common core of
 19 operative facts to the assertions in the original petition. For example, ground three claims a violation
 20 of the Vienna Convention, ground four claims a due process violation from counsel's purported
 21 actions as an "agent" for the District Attorneys office in failing to ensure petitioner received a
 22 preliminary hearing within fifteen days. As with the previous grounds, none of the remaining claims
 23 related to petitioner's original issue. These grounds for relief are all untimely.

24 Petitioner presents no arguments to support equitable tolling of the statute of
 25 limitations. He does contend that his appellate counsel was ineffective for failing to recognize and
 26 present grounds 3 through 9 on appeal and for not discussing the issues with petitioner. However,

1 these arguments are presented in an apparent attempt to overcome the procedural bar imposed by the
 2 state courts Petitioner presents no argument to suggest that the new claims relate back to the original.
 3 Any argument that actual innocence may excuse the untimely filing is also untenable. *Lee v.*
 4 *Lampert*, 610 F.3d 1125 (2010). Thus, grounds 3, 4, 5, 6, 7, 8 and 9 are untimely and shall be
 5 dismissed.

6 C. Procedural Bar

7 Having found that grounds 3 through 9 of the amended petition are untimely, there
 8 remains only ground two which is subject to the procedural bar imposed by the Nevada Supreme
 9 Court in denying petitioner's second state post-conviction petition.

10 “When a state prisoner has defaulted a claim by violating a state procedural rule
 11 which would constitute adequate and independent grounds to bar direct review in the U.S. Supreme
 12 Court, he may not raise the claim in federal habeas, absent a showing of cause and prejudice.” *Wells*
 13 *v. Maass*, 28 F.3d 1005, 1008 (9th Cir.1994). Here, ground two is subject to the procedural bar
 14 imposed under Nevada law as NRS 34.726 - timeliness, and NRS 34.810 - second or successive
 15 petitions. These statutes have been consistently applied by the Nevada courts and are adequate and
 16 independent of federal law. *See Moran v. McDaniel*, 80 F.3d 1261, 1268-70 (9th Cir. 1996); *see also*
 17 *Bargas v. Burns*, 179 F.3d 1207, 1210-12 (9th Cir. 1999) *cert. denied*, 529 U.S. 1073 (2000);
 18 *Petrocelli v. Angelone*, 248 F.3d 877, 886 (9th Cir. 2001).

19 “[C]ause ... requires a showing of some external impediment preventing counsel from
 20 constructing or raising the claim.” *Murray v. Carrier*, 477 U.S. 478 492 (1986). For cause to exist,
 21 the external impediment, whether it be government interference or the reasonable unavailability of
 22 the factual basis for the claim, must have prevented petitioner from raising the claim. *See id.*, at 488,
 23 106 S.Ct., at 2645 (cause if “interference by officials ... made compliance impracticable”).

24 Assuming petitioner can show cause for his procedural default, he also must show
 25 prejudice arising from the alleged constitutional errors. Petitioner must show “not merely that the
 26 errors of the trial created a possibility of prejudice, but that they worked to his actual and substantial

1 disadvantage, infecting his entire trial with error of constitutional dimensions.” *United Stated v.*
 2 *Frady*, 456 U.S. 152, 170 (1982). In essence, to show actual prejudice on the basis of his claims,
 3 petitioner must demonstrate that the alleged errors so infected the trial that his resulting conviction
 4 violated due process. *Id.*

5 As an alternative to showing “cause and prejudice,” petitioner may attempt to show
 6 that dismissal of his instant claims on procedural default grounds will result in a “fundamental
 7 miscarriage of justice.” Such a showing, however, is very difficult to make. It requires petitioner to
 8 demonstrate that he is “actually innocent” of the crime of which he was convicted. *See Smith v.*
 9 *Murray*, 477 U.S. 527, 537 (1986) (citing *Murray v. Carrier*, 477 U.S., at 496); *see also Engle v.*
 10 *Isaac*, 456 U.S. 107, 134-135 (1982)

11 D. Petitioner’s Arguments

12 In attempting to show cause to overcome the procedural bar, petitioner argues the
 13 ineffective assistance of appellate counsel for failing to recognize and submit for consideration the
 14 then newly decided principles of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 2354 (2000)
 15 and *Abrego v. State*, 118 Nev. 54, (2002). Petitioner contends that counsel’s failure to raise claims
 16 that “were not legally widespread” until after the filing of the direct appeal in this instance was not
 17 “mere inadvertence, [but] a direct violation of law on appeal matters.” If the procedural default is
 18 the result of ineffective assistance of counsel on appeal, “the Sixth Amendment itself requires that
 19 responsibility for the default be imputed to the State.” *Carrier*, 477 U.S., at 488, 106 S.Ct., at 2646.
 20 However, the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed
 21 to raise the claim despite recognizing it, does not constitute cause for a procedural default. *Engle v.*
 22 *Isaac*, 456 U.S. 107, 102 S.Ct. 1558 (1982). Petitioner’s allegations do not meet the extremely high
 23 standard of a factor external to the defense. Moreover, petitioner offers nothing to show that an
 24 external factor prevented counsel from raising the *Apprendi/Abrego* claims or that the claims were
 25 not available at the time the appeal was filed. In fact, petitioner’s arguments suggest the opposite -
 26 that the claims were available, but not presented.

1 Because petitioner has not shown cause to overcome the procedural default, a
2 consideration of prejudice is unnecessary. *Strickland v. Washington*, 466 U.S. at 688, 692, 104 S.Ct.
3 2052, 2067 (1984).

4 Finally, petitioner claims that he is actually innocent of the charges, which should
5 excuse the default. He argues that he “has demonstrated in the writ and accompanying documents
6 that he in fact did not shoot anyone on that fateful night.” Opposition, p. 6. Actual innocence is a
7 gateway through which a petitioner may have previously barred claims reviewed by the federal court.
8 *Herrera v. Collins*, 506 U.S. 390, 404, 113 S.Ct. 853, 862 (1993). The “actual innocence”
9 exception, also known as the “fundamental miscarriage of justice” exception, is reserved for
10 extraordinary cases in which “a constitutional violation has probably resulted in the conviction of
11 one who is actually innocent.” *Carrier*, 477 U.S., at 495, 106 S.Ct., at 2639 (1986). However, to be
12 credible, a claim of actual innocence must be supported with “new reliable evidence - whether it be
13 exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that
14 was not presented at trial.” *Schlup v. Delo*, 513 U.S. 298, 324, 115 S.Ct. 851, 865 (1995). Petitioner
15 offers no such evidence in opposition to his motion to dismiss. His petition offers nothing by way of
16 new evidence. As a result, petitioner’s argument of actual innocence will not open the gateway to
17 review of ground 2 of the amended petition. The motion to dismiss shall be granted.

18 **IT IS THEREFORE ORDERED** that respondents’ motion to dismiss (ECF No. 34)
19 is **GRANTED**.

20 **IT IS FURTHER ORDERED** that grounds 2, 3, 4, 5, 6, 7, 8 and 9 of the amended
21 petition are **DISMISSED WITH PREJUDICE**.

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IT IS FURTHER ORDERED that respondents shall file their answer to the remaining ground one of the amended petition within thirty days of entry of this order. Thereafter, petitioner shall have thirty days to file his reply.

Dated this 9th day of May, 2011.

Xem C. Mahan
UNITED STATES DISTRICT JUDGE